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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ELTON LEON WILLIAMS,

Defendant and Appellant.

E033056

(Super.Ct.No. RIF77640)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez,
Judge. Affirmed.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Gil P. Gonzalez,
Supervising Deputy Attorney General, and Warren P. Robinson, Deputy Attorney
General, for Plaintiff and Respondent.

Defendant appeals from his conviction for second degree murder (Pen. Code, §§ 187/189),¹ with an enhancement for personally using a firearm (§§ 12022.5, subd. (a), 1192.7, subd. (c)(8)), after he shot and killed his uncle during an argument. We affirm, concluding: (1) The exclusion of testimony from his grandmother describing the strained relations between defendant and his uncle, particularly on the night of the killing, was harmless under any standard because it was merely cumulative. (2) Defendant was not entitled to a jury instruction on imperfect self-defense because he created the circumstances justifying his uncle's aggression by falsely imprisoning his uncle at gunpoint.

STATEMENT OF FACTS

Defendant shot and killed his uncle in October 1997. Defendant was subsequently charged with murder (§ 187), with an allegation that he personally used a firearm (§§ 12022.5, subd. (a), 1192.7, subd. (c)(8)). Following a jury trial, defendant was found guilty of first degree murder and the firearm use allegation, and he was sentenced to 25 years to life, plus 10 years for the firearm use enhancement. However, this court reversed the conviction because the trial court had denied defendant's request for psychiatric services. (*People v. Williams* (Dec. 13, 2000, E023968) [nonpub. opn.].) On retrial, the evidence showed the following:

¹ All further statutory references will be to the Penal Code unless otherwise indicated.

A couple months before the shooting, defendant began complaining about living with his uncle. Defendant told a close friend, who lived next door to his uncle, that he and his uncle argued over household chores. Defendant similarly told his boss, who was a good friend of his uncle, that his uncle was always complaining about the house being dirty. Defendant told his girlfriend that his uncle was controlling and critical, and that he did not like living here and wanted to return to Arkansas. Defendant also told his uncle's ex-wife that he was unhappy living with his uncle.

The tension between defendant and his uncle was apparent to his uncle's ex-wife, who testified that defendant and his uncle did not get along well and argued regularly, mostly about the way his uncle wanted the house to be kept. Defendant's uncle's fiancé testified about an incident where defendant's uncle became hostile because he thought defendant had failed to greet her properly. Defendant's uncle did not calm down until his fiancé reassured him that defendant had acted appropriately. The fiancé thought defendant appeared to be depressed.

Defendant told his friend that he and his uncle also argued about money. Defendant claimed he was giving money to his uncle every month in order to save for a new car, but the money was not there when he asked for it. Defendant believed that his uncle had been spending it all along. Defendant also complained about money to his boss, saying that he was paying his uncle too much for rent and a car that he was going to purchase. Defendant's boss testified that on two occasions, after learning that defendant's boss and uncle had gone out together and spent money that defendant

believed to be his own, defendant threatened them, saying that they were both going to come up missing. After the second threat, defendant's boss responded angrily and defendant apologized, admitting that they were the only people who were looking out for him. Defendant's girlfriend testified that he seemed depressed about money.

Furthermore, although defendant's uncle used his friendship with defendant's boss to get defendant the job, defendant became frustrated with the job, which he claimed was low paying with poor working conditions. Defendant's boss testified that defendant had a bad attitude and would get into scuffles with coworkers, thereby requiring extra supervision. Defendant ultimately quit his job and signed up for the Conservation Corps, but only became more depressed.

Defendant never said anything to his friend, his girlfriend, or his boss about his uncle being physically abusive. The uncle's ex-wife testified that the arguments between defendant and his uncle never got physical. Defendant told his friend that he would not back down if he and his uncle ever got into a physical confrontation, and defendant once told his friend that no matter how tough you are, you cannot beat a bullet.

Earlier that year, the father of defendant's girlfriend threatened to kill defendant after catching them in a compromising position. Defendant told his friend that after that incident, he used to watch the girlfriend's house and they did not realize how easy it would be for him to kill them. Defendant also told his boss about the incident and said that he would kill his girlfriend's father and anyone else in their house. Although his

girlfriend's father forbid them from dating after the incident, they continued to secretly date and kept in touch after she went to San Diego for college.

A couple days before the shooting, defendant asked his friend to do him "one last favor" by taking him to a gun shop, where defendant purchased one box of bullets. Defendant said that the bullets were so cheap that he could buy more, but one box was enough.

On the night of the shooting, defendant called his friend outside to talk. Defendant was upset and crying because his uncle failed to take him to a Conservation Corps interview after promising to do so. Defendant said he was depressed, needed someone to talk to, and the friend was the only one he could talk to. Defendant said that his friend did not know what he was going through, how hard it was; defendant said he was depressed with his life and did not know where his life was going. Defendant said he needed to think about what he wanted to do with his life, and mentioned that he might go see his girlfriend in San Diego. The friend felt that defendant might try to harm himself.

Later that night, defendant's grandmother, who lived in Arkansas, received a telephone call from defendant. She could tell that defendant was worried and in trouble, so she told him to come back to Arkansas and sent him a bus ticket.

The next day, defendant arrived at his girlfriend's college in San Diego. The girlfriend noticed that defendant had his uncle's car and defendant claimed that he purchased it from his uncle after selling a house in Arkansas. Defendant claimed his

uncle was in Arkansas. Defendant stayed with his girlfriend for several days, during which time they went to the mall, went out to dinner, and went to a party. It was never entirely clear how long defendant planned to stay, but his girlfriend did not mind.

In the meantime, when defendant did not arrive on the bus, his grandmother became concerned and began trying to contact him. She eventually called the uncle's ex-wife and relayed her concerns. The uncle's ex-wife had similarly been unable to contact the uncle, so she called the sheriff.

On the ex-wife's instructions, a sheriff's deputy entered the uncle's home and found the uncle's body lying inside the downstairs bathroom, with a gunshot wound through the head. There was one bullet shell casing in the hallway outside the bathroom and one bullet hole in the bathroom cabinet about two feet off the floor. The uncle had a blood alcohol content of .13 percent and tested positive for opiates. There was an open bottle of gin in the kitchen and an empty bottle of malt liquor in the trash. The uncle's pants pockets had been pulled inside out.

In defendant's downstairs bedroom, deputies noticed a hole in the carpet and, after pulling back the carpet, discovered that the cement underneath was chipped. There were pieces of a bullet scattered among the broken cement. They also found an expended shell casing inside a gym bag, along with two white cloths with a gray discoloration that were wrapped in duct tape. There was a white bed sheet next to the gym bag with a series of holes and similar gray discoloration. Defendant's friend claimed that he never heard any gunshots on the night of the shooting.

The police were eventually directed to a dorm on the San Diego State University campus where the uncle's car had been spotted. They watched the car for awhile, then searched it and found a rifle and a shotgun in the trunk. The rifle was the murder weapon and was still loaded. The uncle's wallet was found in the glove box.

Around the same time, defendant's girlfriend got a telephone call from her mother asking about defendant. Defendant's girlfriend learned from her mother that defendant was lying about his uncle being in Arkansas and asked defendant if he had killed his uncle. Defendant said no. When his girlfriend's roommate stepped outside to check for police, she was immediately grabbed by police hiding in the hallway. The police asked defendant and the girlfriend to come out as well. The girlfriend came out, but defendant refused.

A police negotiator was summoned and asked defendant about his uncle. Defendant responded that they would not understand, saying: "I didn't have to kill him, but I had to kill him." "There's no way out." Defendant said he had to shoot his uncle because his uncle was abusive. Defendant asserted that he was not a "crazy killer" because he let his girlfriend and her roommate go when he could have killed them. Defendant said he originally planned to kill his girlfriend because he did not want anyone else to have her if he went to prison, but changed his mind when he saw her and realized how much he loved her. Defendant claimed that he was confused and did not know what to do. Defendant initially insisted that the police would have to come in and kill him, but eventually came out on his own.

After being taken into custody, defendant told the police that he and his uncle did not get along, and that his uncle once choked him during a “scuffle.” Defendant claimed that his stepfather had been abusive and that the situation with his uncle was similar.

Defendant complained that his uncle took all his money and lied about it. Defendant’s uncle kept saying he needed defendant’s money to pay the bills and promised that things would get better, but they never did. Defendant felt like he was working for nothing and his uncle was just using him. Defendant claimed that his uncle had a gambling problem.

Defendant said he called his grandmother frequently and she wanted him to come home. Defendant claimed that he stayed with his uncle as long as he did only because he thought the Conservation Corps was going to work out, but then the uncle refused to drive him to the interview.

On the night of the killing, defendant claimed that he told his uncle that he was thinking about leaving and his uncle yelled at him to go ahead and leave because there was nothing more he could do. The uncle then left and went to a bar. After that, defendant called his grandmother and told her that he was really upset, could not take it anymore, and needed to leave. His grandmother said she would put him on the bus the next morning and told him to just get to the bus station. Defendant had some gin while he waited for his uncle to return.

Defendant claimed that his uncle was drunk and belligerent upon returning from the bar. Defendant told his uncle that he was leaving to go live with his grandmother and

needed a ride to the bus station. That sparked an argument, during which his uncle called him a “little bitch” who went crying to his grandma and started to walk away. That hurt defendant’s feelings and he “snapped.” Defendant grabbed the gun and told his uncle that he was going to listen. The uncle got quiet and sat down as instructed, but defendant became upset and complained to the uncle that it took a gun to get him to listen. They talked for hours, with defendant berating the uncle for being abusive, while the uncle continued to be defiant and aggressive. Defendant warned his uncle not to try anything because his uncle was a “tough cookie” who always said that he would kill anyone who pulled a gun on him. But his uncle eventually lost his patience and tried to get up, so defendant pointed the gun at him, “eased” the trigger, and the gun went off. Defendant characterized the shooting as an accident.

Defendant indicated that he bought the gun on the street just after he stopped working and had previously fired it in the desert. Defendant admitted that he had the gun because he knew he might end up shooting his uncle if he got mad enough. Defendant also admitted that he purchased bullets a couple days before because he wanted to have a loaded gun if his uncle tried anything.

Defendant said the gun went off once before in his bedroom by accident while he was playing with the safety. Defendant claimed that he wrapped the muzzle in cloth to keep it quiet just in case it went off because it was a “tricky” gun. Defendant subsequently admitted that he purposely shot the gun into the floor to make sure it still worked.

Defendant's grandmother testified on his behalf, claiming that defendant lived with her most of his life and always had trouble with chores and schoolwork. She also claimed that defendant was not breathing when he was born.

The defense presented a medical expert, who testified that a positron emission tomography (PET) scan of defendant's brain showed decreased activity in the frontal lobe, basal ganglia, and thalamus. The expert testified that this pattern is often visible with traumatic brain injuries or psychotic disorders, and is associated with impaired judgment and an inability to regulate aggression.

The defense also presented a neuropsychologist, who testified that defendant had several indicators for potential brain damage or dysfunction, such as his history of academic difficulty; his problems breathing at birth and severe asthma attacks as a child, which can affect brain development by causing oxygen deprivation; his history of head injuries, including being knocked unconscious as a child; his admitted alcohol abuse; and the fact that he had been working in a paint factory, where the fumes made him sick. Additionally, defendant complained of having difficulty organizing his thoughts, maintaining attention and concentration, and making decisions, and often feels as if his thinking is "blocked." The neuropsychologist testified that these symptoms were typical of executive dysfunction, or frontal lobe dysfunction, which was also evident on the PET scan.

The neuropsychologist testified that defendant's testing responses were adequate or normal; however, they were abnormally slow, and when pressed for speed his

responses fell into the impaired range. Furthermore, complicated tasks involving higher level executive thinking were beyond defendant's capability. Defendant also did poorly on a test involving concentration and focus. These tests ultimately corroborated defendant's self-described symptoms.

The neuropsychologist also gave defendant personality and emotional tests, which indicated that defendant was suffering from low self-esteem, feelings of inadequacy, anxiety, and depression. Defendant lacked goals and felt that he did not have an adequate social support system. Defendant did not feel like he was in control. Overall, defendant's emotional state fell in the distressed range. Defendant was someone who tends to act out on his feelings without reflecting on the proper course of action and someone who may lose control under high levels of situational stress. The neuropsychologist further noted that defendant was feeling somewhat intoxicated on the night in question, which can compromise brain functioning and exacerbate his existing problems.

In response, the prosecution presented a medical expert who opined that the PET scan was not acceptable as a clinical tool and was unreliable because of the procedures used by defendant's doctor. Furthermore, the prosecution expert opined that the reduced brain activity was still within the normal range.

Based on this evidence, defendant was found guilty of the lesser offense of second degree murder and the firearm use enhancement was again found to be true. Defendant was sentenced to 15 years to life, plus 10 years for the firearm use enhancement.

DISCUSSION

1. *Evidentiary Restrictions*

Defendant argues that the trial court erred by prohibiting his grandmother from (1) testifying that defendant told her on the night of the killing that he could not take living with his uncle anymore and wanted to come back to live with her, and (2) providing her lay opinion regarding the intensity of the emotions between defendant and his uncle. Defendant argues that this evidence was relevant to the lesser offense of heat-of-passion voluntary manslaughter.

We find that the alleged error was harmless under any standard because this evidence was merely cumulative. As noted above, several people testified about the strained relationship between defendant and his uncle, and defendant's friend testified about how upset defendant was on the night of the shooting. Additionally, defendant's grandmother was permitted to testify that defendant sounded so upset on the telephone that she immediately bought him a bus ticket.

2. *Imperfect Self-Defense*

Defendant argues that he was entitled to a jury instruction on imperfect self-defense. We disagree. An actual but unreasonable belief in the need to defend oneself negates the element of malice necessary for murder, thereby reducing the offense to manslaughter. (*In re Christian S.* (1994) 7 Cal.4th 768, 773.) However, as with the ordinary doctrine of self-defense, the doctrine of imperfect self-defense cannot be invoked "by a defendant who, through his own wrongful conduct (e.g., the initiation of a

physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified.” (*Id.* at p. 773, fn. 1.) Although defendant contends that this footnote from *Christian S.* is merely dicta, the Supreme Court subsequently applied that dicta in *People v. Seaton* (2001) 26 Cal.4th 598, 664, thereby establishing it as a binding rule of law. Applying that rule, defendant clearly was not entitled to an imperfect self-defense instruction. By falsely imprisoning his uncle at gunpoint, defendant provided his uncle with justification for using force to escape.

DISPOSITION

The judgment is affirmed.

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/s/ McKinster
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Gaut
J.